Supreme Court, U.S.
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No. 00-221

IN THE

Supreme Court of the United States

MARY BUCHIGNANI,

Petitioner,

v.

VINING SPARKS, IBG, a Limited Partnership
and VINING SPARKS SECURITIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Vining Sparks Securities, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent, Vining Sparks, IBG, is a Tennessee limited partnership. Vining Sparks Securities, Inc. is the general partner of this partnership, and Union Planters Corporation, a publicly held company, is the limited partner.

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RESPONSE TO PETITIONER'S STATEMENT OF MATERIAL FACTS

Litigation is, by its very nature, generally a contentious undertaking, and it is thus not surprising that Respondents Vining Sparks, IBG and Vining Sparks Securities, Inc. (collectively "Vining Sparks") take issue with a number of the "material facts" presented in the Petition for Writ of Certiorari prepared by Petitioner Mary Buchignani ("Buchignani"). It is, in addition, beyond dispute that this Court does not ordinarily see fit to moderate the parties' divergent view of the relevant circumstances. In the present scenario, however — in which Buchignani questions the utility of the arbitration process at least in part on the strength of her contention that a wealth of "unrebutted" testimony demonstrated the "severity" and "pervasiveness" of the discrimination and harassment to which she allegedly was subjected — it is worthwhile, and even necessary, to point out that the facts before the arbitrators were not, in truth, so one-sided. To the contrary, as exhibited by the examples contained in the succeeding paragraphs, Vining Sparks vigorously defended against Buchignani's claims by, among other things, presenting evidence to rebut virtually every facet of her Title VII case.

To begin with, as particularly relevant to Buchignani's charges of harassment, it is significant that she confirmed her own use of vulgar language and profanity while on the securities trading floor. Buchignani further acknowledged that the sales area represented a "raucous environment, male and female," and she admitted displaying a poster in her cubicle indicating that "sexual harassment will not be discouraged, however, it will be graded." Further proof exposed Buchignani's primary complaints as generalizations

describing incidents scattered over a ten year period of employment, and other females employed by Vining Sparks offered that the trading environment, while stressful, was not hostile, offensive, degrading, or demeaning in a sexual sense. Finally, Buchignani admitted she never heard the corporate CEO use sexually vulgar language, and there was ample proof to justify a conclusion that Vining Sparks responded appropriately to complaints of sexual harassment or discrimination.

Vining Sparks also mounted a serious challenge to Buchignani's cause of action for "disparate treatment" discrimination. For instance, the CEO of Vining Sparks offered Buchignani an opportunity to manage the second largest branch in the company — a position with compensation potential approaching $400,000 per year — but she declined to accept this post. Buchignani also passed on other prospects for advancement within the company, including jobs with responsibilities which combined managerial and financial skills. Moreover, while it is true that the CEO denied Buchignani's petition for creation of a special executive level management position just for her, he also denied a similar request from a male sales representative who wished to leave the sales floor. And, to counter whatever inference Buchignani has attempted to draw from the company's selection of a male replacement for the retiring director of sales, Vining Sparks adverted, inter alia, that the chosen successor had superior knowledge of company products and customers and was the direct subordinate of the departing director.

So, too, were the facts hotly contested with respect to the portion of Buchignani's case alleging retaliatory discharge. Along these lines, Vining Sparks emphasized that

Buchignani failed to articulate a specific complaint of sexual discrimination until after her February 1994 plea for a career change. Within one year of making this request, Buchignani began working irregular hours, sometimes not reporting to duty until 3:00 p.m. Thereafter, when Buchignani became confrontational with a coworker, the company's CEO sought to counsel her. Buchignani responded insubordinately to this gesture by walking out on the CEO and launching into an obscenity filled tirade against her coworker. Upon hearing her superiors' suggestion that a temporary leave might be appropriate, Buchignani stormed out of the building and subsequently informed the director of human resources that she had quit employment.

From these *isolated* examples of the contradictory proof presented at the hearing, it is easy to see why the district court termed this a "highly factual" case which included evidence sufficient to disprove each of Buchignani's theories for recovery. Buchignani herself admits as much by recognizing that the arbitration panel might conceivably have "resolved the case in accordance [with] the substantive Title VII law." To put it simply, three NASD approved arbitrators — two of whom were licensed attorneys, one with extensive general litigation experience and the other with a significant discrimination law background — have sifted through the facts, and four Article III federal judges have reviewed the record in crafting and upholding the award in favor of Vining Sparks. It is unnecessary for this Court to undertake the same review. This Court should deny Buchignani's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE STANDARD FOR REVIEW OF ARBITRATION AWARDS ADOPTED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

Buchignani readily concedes that her sole ground for seeking to overturn the award of the NASD arbitration panel is predicated on the "manifest disregard of the law" framework referenced by this Court in cases such as *First Options, Inc. v. Kaplan*, 514 U.S. 938 (1995). Applying the formulation of this standard utilized by the United States Court of Appeals for the Sixth Circuit in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418 (6th Cir. 1995), the district court concluded that the results of arbitration may be vacated only if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle," *id.* at 421. Contrary to what Buchignani has argued in this Court, the Sixth Circuit's application in Title VII cases of this judicially created rule does not conflict with decisions issued by the other circuit courts of appeals.

In attempting to create a circuit conflict, Buchignani chiefly relies on the opinion issued by the United States Court of Appeals for the District of Columbia Circuit in *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997). The *Cole* opinion, however, by no means suggests any hostility toward a deferential standard of review in Title VII arbitration matters. As an initial point, the case did not even involve

consideration of an arbitration award, but was instead an appeal from the district court's order compelling arbitration. *See id.* at 1467-70. Moreover, although dicta from the opinion indicates that where "novel or difficult legal issues are presented" a court should be "empowered to review an arbitrator's award to ensure that its resolution of public law issues is correct," the D.C. Circuit at the same time observed that "[m]ost employment discrimination claims are entirely factual in nature and involve well-settled legal principles." *Id.* at 1487. Thus, while it is, at this point, speculative — at best — that a circuit conflict could materialize should the D.C. Circuit ultimately approve a heightened standard of review for arbitration awards implicating "novel or difficult legal issues," it is all but certain that factually intensive cases such as the present would be unaffected by any such disharmony.

Citing *Williams v. Cigna Fin. Advisors Inc.*, 197 F.3d 752 (5th Cir. 1999), Buchignani also contends that the United States Court of Appeals for the Fifth Circuit has, as compared to the Sixth Circuit, more liberally construed the meaning of "manifest disregard of the law." In truth, however, *Williams* provides even less support for a circuit conflict than *Cole*. To be sure, the *Williams* court did agree with the D.C. Circuit that "in [the] context [of statutory discrimination claims], the manifest disregard of the law standard must be defined in light of the bases underlying the [relevant Supreme Court decisions]." *Id.* at 762 (quotations omitted). After making this rather unexceptional pronouncement, however, the court proceeded to affirm the confirmation of a written award which, like Buchignani's, "fully state[d] the issues submitted and the conclusions reached, but . . . g[a]ve[] no rationale or reasons for the decision." *Id.* at 757. In doing so, the court used a standard substantially similar to the one

employed by the Sixth Circuit in *Merrill Lynch*. *See id.* at 762 ("First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld."). If anything, then, the Fifth Circuit has offered its implicit support for a deferential standard of review even where the arbitrators furnish no explanation for their decision.

To summarize, Buchignani is incorrect to the extent she argues a circuit conflict exists with respect to the manifest disregard of the law standard. In fact, though the other circuits have used slightly different terms to describe their various conceptions of the rule, they have adopted formulations which are virtually identical — as a matter of substance — to the standard approved in *Merrill Lynch*. *See, e.g.*, *Williams*, 197 F.3d at 762 ("First, where on the basis of the information available to the court it is not manifest that the arbitrators acted contrary to the applicable law, the award should be upheld."); *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) ("[T]here must be something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law in order to reach the result they did."); *Advest Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) ("[An arbitration award may be vacated] where it is clear from the record that the arbitrator recognized the applicable law and then ignored it."); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986) ("The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal

principle but decides to ignore or pay no attention to it."). Given what is, in reality, a virtual consensus on the meaning of "manifest disregard of the law," this Court should reject Buchignani's claim that a circuit split exists on this issue.

II.

THE SIXTH CIRCUIT'S DEFERENTIAL STANDARD OF REVIEW DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *GILMER v. INTERSTATE/JOHNSON LANE CORP.*

Buchignani additionally posits that the standard used by the Sixth Circuit to review arbitration awards is inconsistent with this Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). With all due respect, Buchignani is once again mistaken. In *Gilmer*, this Court held that an employer may enforce its employee's agreement to arbitrate disputes arising under the Age Discrimination in Employment Act of 1967 (the "ADEA"). *See id.* at 35. Responding to the petitioner employee's assertion that it would be inappropriate to arbitrate ADEA claims in light of the important social policies served by that statute, this Court repeated that " 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.' " *Id.* at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)) (initial alteration omitted). Buchignani has seized upon this excerpt to aver that a deferential standard of review cannot ensure that a party's rights have, in fact, been vindicated through arbitration.

In essence, Buchignani is arguing that the arbitral forum cannot be trusted and that intensive judicial review — especially where statutory claims are involved — is necessary to ensure that the arbitrators are properly performing their jobs. This, however, represents the type of unwarranted suspicion of the arbitration process that was categorically rejected in *Gilmer* and other cases as being " 'far out of step with [this Court's] current strong endorsement of the federal statutes favoring this method of resolving disputes.' " *Gilmer*, 500 U.S. at 30 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989)). Furthermore, the employee in *Gilmer*, like Buchignani, maintained that judicial review of arbitration decisions is "too limited," which prompted this Court to reply that the system in place — which was described as "*necessarily* . . . limited" — is "sufficient to ensure that arbitrators comply with the requirements of the statute at issue." *Id.* at 32 n.4 (emphasis added) (quotation omitted). This reasoning is absolutely fatal to Buchignani's suggestion that — in the absence of some heightened standard of review — submission of a matter to arbitration necessarily implies the loss of a party's substantive statutory rights.

Moreover, the empirical evidence absolutely debunks whatever misgivings Buchignani might have about the ability of arbitration to vindicate an employee's statutory rights. Exactly on point is a recent article by the former director of the American Civil Liberty Union's National Task Force on Civil Liberties in the Workplace. *See* Lewis Malby, *Employment Arbitration, Is It Really Second Class Justice?*, Disp. Resol. Mag., Fall 1999, at 23. Mr. Malby's study compares the results of employment arbitration conducted by the American Arbitration Association with litigation results and concludes that "far more employees win in

arbitration than in court, and, overall, employees who take their disputes to arbitration collect more than those who go to court." *Id.* at 24. A similar survey contrasted (i) the outcomes for all employment discrimination cases filed and resolved in the United States District Court for the Southern District of New York for the period April 1, 1997 to November 30, 1999 with (ii) securities industry arbitration awards based on available National Association of Securities Dealers ("NASD") and New York Stock Exchange ("NYSE") arbitration awards involving discrimination claims during the same time period. *See* Michael Delikat, *An Empirical Study of Dispute Resolution Mechanisms for Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, Alternative Dispute Resolution in the Employment Arena, Proceedings, 53d Annual NYU Conference on Labor (S. Estreicher, Editor, forthcoming 2000). Mr. Delikat reports that employees in arbitration before the NASD and NYSE prevailed in forty-eight percent of the cases filed, yet only thirty percent of all employees filing discrimination cases in the United States District Court for the Southern District of New York prevailed in litigation. *Id.*

It is, in the end, apparent that the Sixth Circuit's interpretation of the "manifest disregard of the law" standard is in complete accord with this Court's recent opinions in this field. Buchignani's distrust of the arbitration process is not only inconsistent with the "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), but is also refuted by the available empirical studies. Such being the case, this Court should deny Buchignani's Petition for Writ of Certiorari.

III.

THIS COURT SHOULD SUMMARILY REJECT THE REMAINING GROUNDS OFFERED BY BUCHIGNANI IN SUPPORT OF HER PETITION FOR WRIT OF CERTIORARI

Buchignani also asks this Court to grant her petition based on the legislative history of Title VII and for reasons of public policy. It is, in the first place, questionable whether Buchignani properly developed either of these arguments when challenging before the Sixth Circuit the standard of review used by the district court. Thus, it may not be appropriate for this Court to consider the points at this juncture. *Cf. Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed."). Furthermore, each of these grounds is premised upon Buchignani's implicit assertion that the standard of review for Title VII arbitration should differ from the analysis used when evaluating the arbitration of other types of statutory claims. Buchignani has not, however, provided any defensible justification for — in the arbitration context — treating Title VII any differently from RICO, the securities laws, or multiple other statutes "designed to advance important public policies." *Gilmer*, 500 U.S. at 28. In a nutshell, these additional contentions presented by Buchignani provide no basis for granting the Petition for Writ of Certiorari.

CONCLUSION

The Sixth Circuit reviews arbitration awards involving Title VII claims in a manner that is consistent with the opinions of this Court and the other federal courts of appeals. Consequently, for the reasons explained in this brief, the Court should deny Buchignani's Petition for Writ of Certiorari.

Respectfully submitted,

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